(1)

Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

FRANK McLAIN and HARLEY McLAIN

Petitioners,

v.

GEORGE W. BUSH, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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44pgs

QUESTIONS PRESENTED

(1) Who really won the Presidential Election of 2000? Everyone knows the identity of the candidate who "politically" and "legally" won the Presidential election of 2000; but here the petitioners seek to identify what factors, in light of the Equal Protection Clause of the 14th Amendment, went into determining how the candidate who won did so by violating the constitutional *rectum* of the petitioners. He took their rights and "wrecked um"?

(2) Do the edicts in the decision of *Bush v Gore* relevant to the unique nature of the 2000 Presidential election affect petitioners' standing so that the Supreme Court is in the untenable position of being forced to confront the petitioners' equal protection questions?

(3) Have both George W. Bush and Albert Gore and their political parties availed themselves to the jurisdiction of the federal courts as Presidential candidates thus providing standing for a suit in equity for violations of the civil rights of the petitioners and any other individual voters in any and all states where they have been certified and qualified as candidates?

(4) Did the District Court and Appeals Court error by not granting the *pro se* petitioners the opportunity to amend their complaint?

(5) Did the Democratic and Republican Parties and their Presidential candidates conspire together to defraud the electorate by limiting access to the Presidential Debates in 2000?

(6) Did George W. Bush in Texas and Jeb Bush in Florida as individuals violate Harley McLain's right to equal protection of the law in a Presidential election by enforcing incumbent-first ballot formats which contravened edicts of a 1980 federal judgment in North Dakota?

(7) Does a petitioner with a federal judgment regarding constitutional election practices have standing to challenge legislation created outside of petitioner's district but within the territory of the United States in a national Presidential Election?

(8) Can a certified copy of a federal declaratory judgment showing that petitioners prevailed in proving a violation of petitioners' equal protection rights be considered as specific evidence of personal harm having been suffered by petitioners?

(9) The Supreme Court in this case is presented with three equal protection questions relating to the Presidential Election of 2000 concerning:

1. the uniformity of standards and fairness of various balloting formats – see question # 10.,
2. voter registration restrictions within the several states – see question # 11.,
3. and conspiracy to defraud the electorate by limiting access to the Presidential Debates – see question # 5.

(10) Did the individual election officials of the states that did not implement rotating balloting formats violate the federally established right to equal protection of the law of the petitioner who has a federal judgment when the rights in question cross over into the sphere of federal jurisdiction by the unique nature of the Presidential election?

(11) Did the individual election officials of the 44 states that enforced registration deadlines prior to the day of the Presidential election unfairly restrict voters from participating equally in the Presidential election in violation of the Fourteenth Amendment?

(12) Does the long arm statute of the state of Montana grant the petitioners the scope of personal jurisdiction necessary to exercise adjudication of this case under the Fourteenth Amendment?

(13) When a governor of a state is elected to the federal office of President using unconstitutional state statutes which he enforced in his state or district and which worked to his advantage in several other states and districts to procure such office, did he contravene, create an incursion, and violate the federal Constitutional rights to equal protection of the law of a voter with a federal judgment that disallows this unfair advantage in another state or district of the Republic? Does he, the former governor and present "President" not avail, invite, and subject himself to a suit in equity when challenged by the voter with the federal constitutional

judgment when he accepts the office of President and avail, invite, and subject himself to the jurisdiction and scrutiny of the federal courts for his neglect of duty as a governor to the voter with a protected political right in the federal sphere of sovereignty?

(14) What remedies are available to the petitioners who are common run-of-the-mill voters, one of whom has been denied his right to vote by a state-imposed early voter registration deadline, and both of whom have been denied a federally established right to fair balloting practices by the elected individuals in various states acting under the color of law in a federal Presidential Election?

(15) In the federal election of President has a person who has been denied the right to vote because of restrictive registration statutes suffered personal concrete harm?

LIST OF PARTIES

George W. Bush
Richard Cheney
Albert Gore
Joseph Lieberman
Republican National Committee
Jim Nicholson
Democratic National Committee
Ed Rendell
The Commission on Presidential Debates
Paul Kirk
Frank Fahrenkopf
Marc Racicot
Mike Cooney
Joseph P. Mazurek
Jeb Bush
Katherine Harris
Robert A. Butterworth
Elton Bomer
John Cornyn
Donald Siegelman
Jim Bennett
Bill Pryor
Tony Knowles
Fran Ulmer
Bruce M. Botelho
Jane Dee Hull
Betsey Bayless
Janet Napolitano
Mike Huckabee
Sharon Priest
Mark Pryor
Gray Davis
Bill Jones
Bill Lockyer
Bill Owens
Ken Salazar
John G. Rowland
Susan Bysiewicz
Richard Blumenthal
Thomas R. Carper
Edward J. Freel
M. Jane Brady
Beverly D. Rivers
Robert Rigsby
Roy Barnes
Cathy Cox
Therbert Baker
Benjamin J. Cayetano
Mazie Hirono
Earl Anzai
Dirk Kempthorne
Pete T. Cenarrusa
Alan G. Lance
George H. Ryan
Jessie White
Jim Ryan
Frank O'Bannon
Sue Anne Gilroy
Karen Freeman-Wilson
Tom Vilsack
Chet Culver
Tom Miller
Bill Graves
Ron Thornburgh
Carla J. Stovall
Paul E. Patton
John Y. Brown
Albert Benjamin Chandler III
Mike Foster
W. Fox McKeithen

Donetta Davidson
Angus S. King
Dan A. Gwadoski
Andrew Ketterer
Parris N. Glendening
John T. Willis
J. Joseph Curran, Jr.
Argeo Paul Cellucci
William Gavin
Tom Reilly
John Engler
Candice Miller
Jennifer Ganholm
Jessie Ventura
Mary Kiffmeyer
Mike Hatch
Ronnie Musgrove
Eric Clark
Mike Moore
Roger Wilson
Rebecca Cook
Jeremiah W. "Jay" Nixon
Mike Johanns
Scott Moore
Don Stenberg
Kenny C. Guinn
Dean Heller
Frankie Sue Del Papa
Jeanne Shaheen
William Gardner
Philip T. McLaughlin
Christeen T. Whitman
Deforest Soaries
John Farmer
George E. Johnson
Rebecca Vigil-Giron

Richard P. Ieyoub
James B. Hunt, Jr.
Elaine Marshall
Michael F. Easley
Edward T. Schafer
Alvin A. Jaeger
Heidi Heitkamp
Bob Taft
J. Kenneth Blackwell
Betty D. Montgomery
Frank Keating
Mike Hunter
W.A. Drew Edmondson
John A. Kitzhaber, MD
Bill Bradbury
Hardy Myers
Tom Ridge
Kim Pizingrilli
Mike Fisher
Lincoln Almond
James Langevin
Sheldon Whitehouse
Jim Hodges
Jim Miles
Charlie Condon
William J. Janklow
Joyce Hazeltine
Mark Barnett
Don Sundquist
Riley Darnell
Paul Summers
Michael O. Leavitt
Olene S. Walker
Jan Graham
Howard Dean, MD
Deb Markowitz

Patricia Madrid
George E. Pataki
Alexander F. Treadwell
Eliot Spitzer
Gary Locke
Ralph Munro
Christine O. Gregoire
Cecil H. Underwood
Ken Hechler
Darrell V. McGraw, Jr.
Tommy G. Thompson
Douglas La Follette
James E. Doyle
Jim Geringer
Joe Meyer
Gay Woodhouse
Janet Reno
William H. Sorrell
James S. Gilmore III
Anne P. Petera
Mark L. Earley

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A. The Ninth Circuit's Not For Publication Memorandum Is In Conflict With The Supreme Court's Decision In *Haines v. Kerner* 404 U.S. 519 (1972) And With The Eighth Circuit's Decision In *McLain v Meier* 612 F.2d 349 At 356 (1979). The Ninth Circuit Erred By Overlooking The District Court's Abuse Of Judicial Discretion In The Granting Of Summary Judgment To The Defendants. The Ninth Circuit Should Have Overturned The Order Of The District Court For Not Construing Pro Se Pleadings Liberally In Their Favor And For Its Failure To Grant Or Instruct The Pro Se Litigants With An Opportunity To Amend Their Complaint.

B. The Petition For Certiorari Should Be Granted To Maintain Uniformity And Equality Between Various Circuit's Decisions In Regard To Equal Protection Questions Concerning Ballot Positioning Schemes And Voter Registration Restrictions And To Consider The Effect Such Schemes And Restrictions Have On The Presidential Election Process.

C. The Recent Supreme Court Decision Of *Bush v Gore* Exemplifies The Importance That Equal Protection Of The Law Be Afforded To Voters In All States Because The President And The Vice President Of The United States Are The Only Elected Officials Who Represent All The Voters In The Nation. The Ninth Circuit's Decision Not To Grant Standing Is In Conflict With The Unique Jurisdictional Status Which The Court Recognizes When Presented With Federal Questions Related To The Election Of The President. Throughout *Bush v Gore* The Supreme Court Sets Forth Its Unique Constitutional Responsibility To Undertake An Independent, If Not Deferential, Analysis Of Various State Legislatures' Roles Under Article II In The Matter Of The Manner In Which Presidential Electors Are Chosen. The Supreme Court Has Recognized Therein That When A State's Legislature, Acting Under Article II, Section 1 Of The Federal Constitution, Vests The Right To Vote For Presidential Electors In The State's People; One Source Of The Fundamental Nature Of The Right To Vote As The Legislature Has Prescribed Lies In The Equal Weight Accorded To Each Vote And The Dignity Owed To Each Voter. Pursuant To The Equal Protection Clause Of The Constitution's Fourteenth Amendment, The Petitioners Have Standing And Should Be Granted Certiorari Because They Have Suffered An Injury To Their Basic Human Right To Vote On Equal Terms For The President Of The United States By The Named Respondents In Their Various Districts. Furthermore, The Process And Manner In Which The President Is Elected Is Of National Importance.

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PETITION FOR A WRIT OF CERTIORARI

Frank McLain and Harley McLain respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this Case.

OPINIONS BELOW

The opinions below are unreported. The Ninth Circuit Court of Appeals filed a NOT FOR PUBLICATION MEMORANDUM No. 01-35373, D.C. No. CV-00-00222-JDS on January 25, 2002, an ORDER was entered on March 8, 2001 Cause No. CV 00-222-BLG-JDS and the FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE was filed February 9, 2001 Cause No. CV 00-222-BLG-RWA. See Appendix A.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and in accordance with Rule 10 of the Rules of the Supreme Court of the United States to review the Memorandum filed by the United States Court of the Ninth Circuit No. 01-35373; D.C. No. CV-00-00222-JDS filed January 25, 2002.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT I
AMENDMENT XII
AMENDMENT XIV
3 USC 6
3 USC 15
42 USC 1983
42 USC 1985(3)
Montana Statute 13-2-301(1)(1) Close of Registration
NDCC 16-11-06
Florida Title 9 Sec. 101.151.(4) Incumbent first ballot
Texas Title 5 Sec. 52.091(b) Incumbent first ballot

See Appendix C for Statutes

N.H. Title LXIII, Ch. 656:5,II Incumbent first ballot
McLain v Meier, 637 F.2d 1159(1980)

I. STATEMENT OF CASE

Frank and Harley McLain filed a complaint in U.S. District Court in Billings, Montana on December 11, 2000 pursuant to Title 42 USC 1983 and 1985 (3). The petitioners sought injunctive relief, mandamus, and monetary damages hoping to halt the Governors, Attorney Generals, and Secretaries of State from certifying and transmitting the Presidential Electors' votes to Congress as prescribed in 3 USC Sections 1-20 until the underlying legal issues presented herein could be considered. The petitioners also claimed that the Presidential Debates were set up to defraud the public by the Democratic and Republican parties in violation of 42 USC 1985.

On February 9, 2001 Magistrate Judge Richard W. Anderson issued Findings and Recommendations, and on March 8, 2001 Judge Jack D. Shanstrom dismissed the cause of action for lack of standing. The petitioners appealed to the Ninth Circuit Court of Appeals which on January 25, 2002 issued a "Not for Publication" MEMORANDUM affirming the district court decision. Appellant jurisdiction was invoked pursuant 28 USC 1291 and in the District Court under Title 28 USC 1331 and 1343 because the petitioner raised a federal question.

Petitioners respectfully request review of the Ninth Circuit Court's Memorandum.

II. STATEMENT OF FACTS

Frank and Harley McLain are challenging 163 individuals (150 elected state officials) and two private political parties for the roles they played acting under color of law in electing the President of the United States in the 2000 election. Frank McLain was denied has right to vote in the federal Presidential election in 2000 by an early registration statute in Montana. Frank McLain procured an absentee ballot from his former state of residence Minnesota but a snowstorm prevented him from being able to cast a timely vote for President. Frank McLain's absentee ballot is in the U.S. District Court in Billings, Montana awaiting disposition of this case. (See Frank's affidavit) Harley McLain has a federal declaratory judgment from the U.S. District Court in North Dakota defining the format and

makeup of a constitutional ballot. Harley McLain lost his federally established right to equal treatment of the law when ballots in several of the states (including Florida, Texas, New Hampshire, Delaware, etc.) during the 2000 Presidential election used obsolete and unfair incumbent-first ballot formats which "granted one group greater voting strength than another in hostility to the one man, one vote basis of our representative government." (See Harley's Affidavit)

The McLains are in court to redress the injuries they have suffered and seek just compensation from those who are responsible for the invidious violations of their rights.

III. REASONS FOR GRANTING THE PETITION

Within *Bush v Gore* is the affirmative answer to granting standing to the petitioners to pursue their constitutional claims in federal court because the Ninth Circuit and the Montana U.S. District Court have settled an important federal question in a way that conflicts with the relevant decisions expressed therein.

In *Bush v Gore* the Supreme Court protected George W. Bush's right to equal protection of the law under the Fourteenth Amendment because "there was no recount procedure in place, under that judgment, that comported with minimal standards required under the Fourteenth Amendment," and " the court's recount mechanisms did not satisfy the minimum requirements for the nonarbitrary treatment of voters that was necessary to secure the fundamental right to vote as the state's legislature had prescribed" *Bush v Gore(2000) 148 L Ed 2d, 390.* Chief Justice Rehnquist found "that the Florida Supreme Court's interpretation of the state's election laws impermissibly, in violation of Art II, Section 1, cl 2, distorted those laws beyond what a fair reading required."

Bush v Gore defined the relationship between the Democratic and Republican candidates for President in conjunction with Florida in terms of equal protection of the law for recounts. What the litigants neglected to mention (covered-up) was how that decision didn't take into account the effect of the unequal ballot positioning scheme in Florida which allowed George W. Bush an unfair ballot positioning advantage over the other candidates which allowed George W. Bush to win the election. The present case exposes the effect that the Florida incumbent-first balloting

scheme had on the election results nationwide and on the equal protection rights of the petitioners.

There is no doubt that the Petitioners have standing for they have suffered egregious, concrete, and personal harm from having lost their First Amendment right to representation in government. The U.S. District Court and Ninth Circuit have even failed to recognize the evidence Frank McLain presented before them in the form of an uncounted Minnesota absentee ballot and in the form of Harley McLain's federal declaratory judgment declaring incumbent-first balloting schemes as a violation of the Equal Protection Clause of the Fourteenth Amendment. Does the Court require a pound of flesh? Or must one bring forth a body or a severed tongue to prove that his right to life and liberty, expression and association has been violated?

The Montana Federal District Court and the Ninth Circuit Court have so departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's supervisory power. The petitioners were never given an opportunity to amend their original complaint nor allowed to appear for a hearing before a judge. The District and Appeals Courts have decided by default these important questions of federal law. Possibly because these questions should be settled by the Supreme Court. By sidestepping the federal questions with their bogus "lack of standing" biases, the Ninth Circuit Court and the District Court have decided an important federal question in a way that conflicts with the relevant decisions of the Supreme Court as stated in *Bush v Gore* 148 L Ed 2d.

The dicta found in *Bush v Gore,* 148 L Ed 2d 388,403 (2000) legitimizes the uniqueness of the Presidential election process and validates the jurisdictional standing that these petitioning voters claim in relationship to the challenged candidates and officials.

> "We deal here not with an ordinary election, but with an election for the President of the United States." *Bush* at 403.
>
> "Likewise in *Anderson v Celebreezze,* we said: "[I]n the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation."

This expanded jurisdictional dimension mandated in *Bush* applies

in this case because of the nature of Article II of the Federal Constitution in relationship to the national Presidential election and the Equal Protection Clause of the Fourteenth Amendment.

Quoting the Court,

> "[I]n ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character. See US Const., Article IV, Section 4. But there are a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State's government. This is one of them. Article II, Section 1,cl 2, provides that "[e]ach State shall appoint, in such Manner as the *Legislature* thereof may direct," electors for the President and Vice President. Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance."

Within the confines of *Bush v Gore* at 398, the Supreme Court validates an expanded jurisdiction in cases dealing with Presidential elections in which

> "lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."

furthermore

> "When contending parties invoke the process of the courts, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront." *Bush* at 402.

The dicta found in *Bush* at 403 lends credence for the Supreme Court to accept this case to resolve the "legal" issues surrounding the political process of the 2000 Presidential election. The petitioners in the present case are asking to "vindicate a constitutional provision designed to protect a basic human right." *Bush* dissent at 428.

When George W. Bush petitioned the Court he invoked fundamental fairness as a need for procedural fairness in the form of finality. George W. did not invoke "equal protection" upon a basic need but relied upon law that focused upon the constitutional allocation of power. That power is invested in the state legislature which has to guarantee that the Electoral College votes will get to Congress to be included in the national Presidential Election.

In *Bush* at 394 it recognizes that, "Under the Federal Constitution's Fourteenth Amendment , a desire for speed is not a general excuse for ignoring equal protection guarantees." But perhaps the Justices did rush to judgment before all of the implications of their verdict could be presented. The petitioners McLain have been patiently waiting for the opportunity to present their case and to have it seriously considered. The finality of the equal protection which George W. Bush sought from the Court has been received by him. Now, Frank and Harley McLain seek just compensation from George W. Bush and his cohorts in conspiracy for violations of their basic right to equal protection of the law in a fair and free Presidential election of which they were denied in 2000.

The petitioners have jurisdictional standing and as individual citizens have a federal constitutional right to vote for electors for the President of the United States because the state legislatures in Montana and North Dakota have chosen a statewide election as the means to implement the legislature's power to appoint members of the electoral college as required under Article II, Section 1 of the Federal Constitution as recognized in *Bush v Gore* 148 L Ed 2d 394.

Article II binds the States together as one jurisdictional nation in the process of the election of the President.

The Supreme Court in *Bush v Gore* also recognized,

> "When a state's legislature, acting under Article II, Section 1 of the Federal Constitution, vests the right to vote for Presidential electors in the state's people, one source of the fundamental nature of the right to vote as the legislature has prescribed lies in the equal weight accorded to each vote and the equal dignity owed to each voter; pursuant to the equal protection clause of the Constitution's Fourteenth Amendment, the right to vote is protected in more than the initial allocation of the franchise, for (1) equal protection applies as well to the manner of the exercise of the franchise, and (2) the state, having once granted the right to vote on equal terms, may not, by later arbitrary and disparate treatment, value one person's vote over that of another; the right to suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Supra p 394.*

The Ninth Circuit Court of Appeals' ruling to quash jurisdiction

upon lack of standing due to state boundaries or jurisdictional borders which separate the parties one from the other are contrary to the edicts found throughout *Bush v Gore*. The Bush Court relies on 3 USC Section 5 that

> "there are areas in which the Constitution requires this court to undertake an independent, if still deferential, analysis." *Bush* at 404. "In any election but a Presidential election....and with respect to a Presidential election, the court must be mindful of the legislature's role under Article II in choosing the manner of appointing electors....*Bush* at 404.

Be that as it may, such dicta invites the court to examine the disparities which elected officials and legislative bodies enforced in several of the states (especially Florida) which may have been uniform in nature but which were not equitable and which have distorted the election laws in those states beyond what a fair reading requires.

Petitioners have pre-eminent and practical legal concerns which require the case at hand to be heard by the United States Supreme Court.

The petitioners have suffered specific and significant injuries to their basic human right to vote and to their right to have a vote which is equal in value to other votes. Petitioners pray for a remedy fashioned to compensate for their injuries. To secure this basic human need, the petitioners are appealing to the Nation's highest judicial forum because it is highly unlikely that the "legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting" without judicial guidance. This is not a trivial concern, and petitioners realize with another election fast approaching that the issues in question are capable of repetition if allowed to evade review. "The press of time does not diminish the constitutional concern," and "unavoidably this Court must sometimes examine state law in order to protect federal rights" *Bush v Gore* p 418. Petitioners believe that this is one of those times.

This is not a case which would "disrupt a State's republican regime", but would protect voters in the States where votes are weighted equally because of the equal rotation position of candidates on the ballot from States which allow votes to be weighted unequally due to incumbent-first ballot schemes which violate the Equal Protection Clause of the Fourteenth Amendment. These ballot inequities have caused a distortion of the intent of the voters in the 2000 Presidential election so that the election results were skewed. The Florida, Texas, and New Hampshire

incumbent-first ballots ran afoul of equal protection and skewed the overall election results in favor of a candidate for whom it was not the intention of the voters to choose.

In *Bush v Gore,* the Supreme Court determined that a "legal vote" is "one in which there is a 'clear indication of the intent of the voter.' " If the ballot is weighted heavily in favor of one candidate by his top position on the ballot in a close election, there can be no legal vote cast because the candidates in the lower position have a Herculean handicap placed upon their shoulders. Therefore the results do not give a clear indication of the intent of the will of the people. "And the people's will is what elections are about."

As succinctly stated by Justice Brandeis of the Court, "The most important thing we do is not doing." *Supra p. 431.* Petitioners' Mother once paraphrased Justice Brandeis as having said "that the most important office in the United States is the office of the citizen." The Supreme Court in *Bush v Gore* did an "important thing" for the elected officers of the government by staying the manual recount of the Florida Presidential Election on Fourteenth Amendment grounds. The District Court and the Ninth Circuit have diddled the "most important office" in the United States by not doing. Perhaps the Supreme Court should do an "important thing" for the citizens of the United States and grant petitioners certiorari.

What the petitioners are seeking from the Supreme Court under 42 USC 1983 & 1985 is a remedy which restores the dignity of their vote, and justly compensates them for their vigilance in protecting their rights. Petitioners hope that the Court instructs them to amend and update their complaint so that at this time a reasonable and equitable remedy can be fashioned and so that due process of law is afforded to all parties who acting under the color of law in the 2000 Presidential election are brought before this court and this court exercise its original jurisdiction. Considering the imminent national importance of this case, and though there may be no precedent to a case like this, this case is the Supreme Court's "unsought responsibility" which is referred to in *Bush v Gore.*

CONCLUSION

Forthwith, Petitioners pray that this court issue a writ of certiorari and order the inferior courts to produce a certified record of this case so that the court may inspect the proceedings and determine whether there have been any irregularities.

Petitioners pray for review on certiorari be granted because the United States District Court in Billings, Montana and the United States Court of Appeals for the Ninth Circuit have decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court, and have so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK MCCLAIN; HARLEY MCCLAIN, Plaintiffs- Appellants, v. GEORGE W. BUSH, JR., Governor of Texas and Republican Candidate for President of the United States, individually and in his official capacity; et al., . Defendants- Appellees.	No. 01-35373 D.C. No. CV-00-00222-JDS MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Jack D. Shanstrom, District Judge, Presiding

Submitted January 14, 2002**

Before: KLEINFELD, HAWKINS, and SILVERMAN, Circuit Judges.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument, and denies plaintiffs' request for oral argument. *See* Fed. R. App. P. 34(a)(2).

Frank McLain and Harley McLain appeal pro se the district court's dismissal of their 42 U.S.C. 1983, 1985, and 1988 action for lack of subject matter jurisdiction. We have jurisdiction pursuant 28 U.S.C. 1291. We review de novo and may affirm on any ground supported by the record. *Steckman v. Hart Brewing, Inc.,* 143 F.3d 1293,1295 (9th Cir. 1998). We affirm.

Because plaintiffs reside in Montana and North Dakota but did not allege a concrete harm caused by the out-of-state defendants, the district court properly dismissed these claims for lack of standing. *See Shaw v. Hunt,* 517 U.S. 899, 904 (1996) (holding that a plaintiff lacks standing to challenge legislation created outside of plaintiff's district absent specific evidence of personal harm); *United States v. Hayes,* 515 U.S. 737, 743-44 (1995) (indicating that a generalized grievance against allegedly illegal government conduct is insufficient to provide standing).

The district court properly dismissed Harley McLain's claims against the North Dakota defendants because he failed to allege a concrete harm. *See Hayes,* 515 U.S. at 743-44. The district court properly dismissed Frank McLain's claims against the Montana defendants because the complaint was conclusory and did not adequately link defendants to causes of action. *See McHenry v. Renne,* 84 F.3d 1172, 1175 (9th Cir. 1996) (indicating that a complaint must make clear the connections between specific allegations and individual defendants).

Because any amendment of plaintiffs' complaint would be futile, dismissal without leave to amend was appropriate. *See Cahill v. Liberty Mut. Ins. Co.,* 80 F.3d 336,339 (9th Cir. 1996); *Barilla v. Ervin,* 886 F.2d 1514, 1522-25 (9th Cir. 1989) (declaring constitutional Oregon's 20-day voter registration cut off), *overruled on other grounds, Simpson V. Lear Astronics Corp.*, 77 F.3d 1170,1174 (9th Cir. 1996).

Because plaintiffs fail to specifically challenge the remainder of the magistrate judge's findings and recommendation in their opening brief, these arguments are waived. *See Arpin v. Santa Clara Valley Transp. Agency,* 261 F.3d 912,919 (9th Cir. 2001) (holding that issues which are not specifically and distinctly argued and raised in a party's opening brief are waived).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Frank McLain and Harley McLain,	)	Cause No. Cv 00-222-BLG-JDS
Plaintiffs	)	
vs.	)	
GEORGE W. BUSH, et al.,	)	ORDER
	)	*******
Defendants	)	

U.S. Magistrate Judge Richard W. Anderson recommends dismissing this case in its entirety for lack of jurisdiction. Plaintiffs' objections thereto are baseless.

After de novo review the Court finds Judge Anderson's Findings and Recommendations well-grounded in law and fact and hereby adopts them in their entirety.

IT IS HEREBY ORDERED

1. All pending motions to dismiss are granted. Plaintiffs' cause of action is dismissed in its entirety for lack of jurisdiction.

2. Plaintiffs' motion for writ of mandamus, motion to expedite, motion for declaratory relief and preliminary injunction, and motion for declaratory judgment and for preliminary and permanent injunctive relief are denied.

The Clerk shall forthwith notify the parties of the making of this order.

DONE and DATED this 8th day of March, 2001.

"s/Jack D. Shanstrom"
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

FRANK McLAIN and HARLEY McLAIN	)
	) Cause No.
Plaintiffs,	) CV 00-222-BLG-RWA
	) FINDINGS AND
vs.	) RECOMMENDATIONS OF
	) UNITED STATES
	) MAGISTRATE JUDGE
GEORGE W. BUSH, et al.,	)
	)
Defendants.	)

Pending before the Court are plaintiffs' motion for writ of mandamus, motion to expedite, motion for declaratory and preliminary injunction, and motion for declaratory judgment and for preliminary and permanent injunctive relief. Also pending are several motions to dismiss filed by various defendants in the action.[1] Having considered the briefs of the parties, the Court is prepared to rule.

BACKGROUND

Plaintiffs file this action on December 11, 2000, against the Republican and Democratic Presidential and Vice-Presidential candidates for the year 2000, George W. Bush, Richard Cheney, Al Gore, and Joseph Lieberman; the Republican National Committee; the Democratic National Committee; the Commission on Presidential Debates; Janet Reno, Attorney General of the United States; as well as the Governors, Secretaries of State, and Attorney General of each of the states in the union and the District of Columbia-- some 163 defendants in all.

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[1] By the Court's count as of the date of this writing, 19 motions to dismiss have been filed by various state defendants. The motions assert similar defenses: Eleventh Amendment immunity, standing, personal jurisdiction, failure to state a claim, and failure to comply with Rule 89(a), Fed.R.Civ.P. Three of the motions are fully briefed, and plaintiffs have responded to eight of the others.

Plaintiff Frank McLain, a resident of Montana, challenges the constitutionality of the 30-day residency requirement for registration to vote in elections mandated by Montana and federal law, Statute 13-2-301, MCA, and 42 U.S.C. 1973aa-1(d) and (e). Plaintiff Harley McLain, a resident of North Dakota, challenges the ballot positioning schemes of several states, specifically Florida, Texas, and Delaware, alleging that the location of presidential candidates on the ballots of these various states has placed an unfair burden on his right to vote. Finally, both plaintiffs contend that they were defrauded by the year 2000 presidential debates because the Commission on Presidential Debates enacted criteria which limited the field of candidates eligible for the debates to those of the two major political parties. The complaint seeks injunctive and declaratory relief and money damages in the amount of "One Federal Reserve Note for every vote cast and counted in the Presidential Election of 2000." Complaint at 17.

DISCUSSION

In conjunction with the complaint, plaintiffs filed a motion for declaratory judgment and preliminary injunction and a motion to expedite. In these motions, plaintiffs requested an order enjoining the acceptance, certification, and transmittal of the Democratic and Republican electoral vote to the Electoral College. They also requested a stay of the meeting of the Electoral College scheduled for December 18, 2000, and an order declaring the electoral votes null and void.

Plaintiffs also filed a writ of mandamus in which they requested an order directing the President of the Senate to count plaintiff Harley McLain's vote "and announce the Constitutional President of the United States before both Houses on Congress on or about January 6, 2001." Pls'Brief in Support of Writ of Mandamus at 4.

On December 18, 2000, plaintiffs filed another motion for declaratory and preliminary injunctive relief, this time seeking a permanent injunction as well. In this motion plaintiffs asked the Court to restrain the certification of the Electoral College votes to the President of the Senate during the first week of January 2001.[2]

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[2] Plaintiffs also requested the following injunctive relief:

1. limiting voter participation and equal access to the polling places through unconstitutional prior restraint registration laws which censor at least 3.5% of the voting

Plaintiffs motion for preliminary injunctive relief and writ of mandamus should be denied as moot. The Electoral Votes have been certified to the President of the Senate, and George W. Bush has been sworn into office as the President of the United States. Thus, the Court is unable to either enjoin the actions of the Electoral College or direct the Senate President to count plaintiff Frank McLain's vote. Issues are moot where, as here, the Court is unable to grant the relief requested because the events sought to be enjoined have already occurred. *American Rivers v. National Marine Fisheries Serv.*, 126 F.3d 1118, 1123 (9th Cir. 1997).

This does not necessarily mean, however, that the entire case has been mooted by the inauguration of President Bush. Claims concerning the constitutionality of election laws are not mooted once an election has occurred. *Storer v. Brown,* 415 U.S. 724, 737 n. 8(1974). Because the laws may affect future elections, such controversies usually fall into the category of claims that are "capable of repetition, yet evading review." *Id.*(quoting *Rosario v. Rockefeller,* 410 U.S. 752,756 n. 5(1973).

First, plaintiffs lack standing to pursue the claims asserted in this action, with the exception of plaintiff Frank McLain's claim concerning Montana and federal voter registration laws. Of all of the jurisdictional doctrines, "standing 'is perhaps the most important ....' " *United States v. Hays,* 515 U.S. 737,742 (1995)(quoting *FW/PBS,Inc. v. Dallas,* 493 U.S. 215, 230-231 (1990)). "To establish standing, [a plaintiff] must demonstrate a personal injury that is fairly traceable to the [defendant's] conduct." *Fund for Animals, Inc. v. Lujan,* 962 F.2d 1391,1395 (9th Cir.1992). A plaintiff with only a generalized grievance against allegedly illegal conduct does not have standing to invoke the judicial power of the federal courts. *Hays,* 515 U.S. at 743. Instead, the plaintiff must demonstrate the following three elements:

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public in any given election in violation of the First and Fourteenth Amendments to the Constitution,

2. using any unconstitutional non-rotating ballot positioning schemes whereby Defendants' candidates receive the top position on all the ballots giving an unfair "definitive statistical advantage of at least five (5) percent"...

3. setting up debates which unfairly exclude all other candidates and parties....

Pls' Motion for Declaratory Judgment and Preliminary and Permanent Injunctive Relief.

> First, the plaintiff must have suffered an 'injury in fact'-an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id. at 742-43 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)).

Here, very liberally construing the allegations of the complaint and plaintiff Frank McLain's attached "affidavit," it appears that Frank, a resident of Montana, was unable to vote in the 2000 Presidential election because he had not registered 30 days prior to the date set for the election as required by Section 13-2-301, MCA. Frank requests a declaration from the Court that *all* laws that restrict voters from registering at the polls the same day as the election violate the First and Fourteenth Amendments.

Although Frank may have standing to pursue his claim that the Montana law violated his constitutional rights, he cannot assert claims against the other state defendants because he did not suffer any direct personal injury as a result of those laws. Frank can assert only a generalized grievance that other voters may have been harmed by the registration laws of other states. Plaintiff has no standing to pursue claims on behalf of other voters. *See, e.g., Shaw v. Hunt,* 517 U.S.899, 904(1996) (Persons who reside outside district which was the subject of a racial gerrymandering claim had no standing.)

Plaintiff Harley McLain contests the ballot positioning schemes of several states. Harley admits, however, that the ballot used by North Dakota, where he cast his vote, was constitutionally valid. Nevertheless, he wishes to challenge the ballots of the other states in which he was neither registered to vote nor attempted to vote.

Harley, like Frank, has no standing to assert these claims because he has failed to assert any direct personal injury. The fact that he may feel aggrieved because other voters may not have had the same fair ballot that he had is insufficient to establish standing.

Nor have plaintiffs established that they have standing to assert the debate fraud claim.[3] Plaintiffs contend that the Commission on Debates

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[3] Although the issue of standing as it pertains to this claim has not been addressed by any of the parties who have appeared, the Court brings it up *sua sponte.* The Court is obligated to examine its own jurisdiction, even if the question has not been raised by the

improperly restricted the marketplace of ideas by allowing only candidates Bush and Gore to participate in the debates. Plaintiffs do not assert, however, that they personally attempted to participate in the debate or even that a candidate of their choice was refused permission to participate. Indeed, Harley affirmatively states that his candidate was Al Gore, one of the participants in the debate. Once again, plaintiffs' grievance is only a generalized one and is insufficient to invoke the jurisdiction of this Court.

In addition to finding that plaintiffs lack standing to assert all but one of their claims, the Court concludes that the Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State.

In this case, plaintiffs have not named any state as a defendant. Instead, they have named state officials. The Court must inquire, therefore, in what capacity the defendants are sued in order to determine whither the suit is in reality one against the State. *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 101 (1984). If the state is the real party in interest, the suit is against the state itself and is therefore barred, even if the suit nominally names a state official as the defendant. *Id. at 101-02.*

An exception to this rule is found in *Ex parte Young,* 209 U.S. 123 (1908), where the Court held that a plaintiff may maintain a suit challenging the constitutionally of a state official's action, because such a suit is not against the state itself. Even so, such suits must seek only prospective relief and not monetary damages. *Edelman v, Jordan,* 415 U.S. 651 (1974).

The Court finds that the claims against the state defendants in this case are barred by the Eleventh Amendment. Although plaintiffs have named individual state officials in the caption of the complaint, they have no where in their detailed pleadings and affidavits indicated what action any of these particular individuals took that infringed upon plaintiffs' constitutional rights. The Court can only conclude, therefore, that the state officials are nominal defendants only, and that the claims are in reality those against the individual states and the District of Columbia.[4]

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parties. *Hays,* 515 U.S. at 742.

[4] Even if plaintiffs had alleged that the individual state defendants had engaged in some

This discussion pertains to the Montana defendants, as well as the other state officials. Although the Eleventh Amendment on it face applies only where a citizen is suing a state other than his own, the immunity has been extended to prohibit suits brought by a citizen against his own state. *Hans v. Louisiana,* 134 U.S. 1 (1890). Thus, even though Frank McLain may have standing to assert his claims against the Montana officials who enforced the allegedly unconstitutional voter registration law, he has failed to properly plead his complaint to indicate who that official was.[5] Accordingly, Frank's claims against the Montana defendants are proscribed by the Eleventh Amendment.

Finally, the Court finds that it does not have jurisdiction over Attorney General Janet Reno. Plaintiffs have joined Reno in this Action because they question the constitutionality of 42 U.S.C. 1973aa-1(d) and (e). Under the Little Tucker Act, 28 U.S.C. 1346(a)(2), federal district courts are empowered to hear constitutional challenges to federal statutes only if plaintiffs seek damages of less than $10,000.[6] Here, plaintiffs seek

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particular unconstitutional activity, plaintiffs' claims would still fail because, as previously discussed, they have no standing to pursue their claims against any of the state defendants except Montana. Therefore, even though leave to amend should be freely granted, especially where plaintiffs are pro se, it need not be granted if the amendment would be futile. *Noll v. Carlson,* 809 F.2d 1446,1448 (9th Cir. 1987).

[5] Rather than alleging that Montana officials illegally enforced the law, plaintiff claims that the officials violated his rights by "adopt[ing] into legislation voter registration laws...." Complaint at 8. Thus, not only is Frank's claim barred by the Eleventh Amendment, the Montana officials are also protected by the doctrine of legislative immunity. *Supreme Court of Virginia v. Consumers Union of United States, Inc.,* 446 U.S. 719 (1980).

As noted above, courts are directed to construe pro se pleadings liberally and to allow amendment of deficiently pleaded complaints. Nevertheless, the Court need not create claims where there are none. Plaintiffs have restricted their pleading to the legislative activities of the Montana officials. The Court will not read the pleadings so expansively as to find a way for plaintiffs to state a claim against the Montana defendants that is not prohibited by the Eleventh Amendment, the doctrine of legislative immunity, or some other jurisdictional bar.

[6] 28 U.S.C. 1346(a)(2) provides in pertinent part:

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Claims, of :...

damages well in excess of this amount. Accordingly, the Court lacks jurisdiction over the challenge to the constitutionality of the federal statute.

RECOMMENDATIONS

In accordance with the foregoing, the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. 636(b)(1)(B), RECOMMENDS that plaintiffs' motion for writ of mandamus, motion to expedite, motion for declaratory and preliminary injunction, and motion for declaratory judgment and for preliminary and permanent injunctive relief be denied.

The Magistrate Judge further RECOMMENDS that all of the pending motions to dismiss be granted and that this case be dismissed in its entirety for lack of jurisdiction.

Under 28 U.S.C. 636(b) and Rule 72(b), Fed.R.Civ.P., the parties shall have 10 days following receipt of these recommendations to serve and file written objections, or objection is waived.

The Clerk of Court shall notify counsel of record and plaintiffs of the making of these findings and recommendations. Plaintiffs are cautioned that they must keep the Court advised of any change of address.

DONE and DATED this 9th day of February, 2001.

"s/Richard W. Anderson" , United States Magistrate Judge

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(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, of any Act of Congress, or any regulation of an executive department...